



The Commonwealth of Massachusetts
William Francis Galvin, Secretary of the Commonwealth
Public Records Division

Rebecca S. Murray
Supervisor of Records

January 3, 2019
SPR18/2060

Ashley K. Carvalho, Esq.
Massachusetts Port Authority
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Dear Attorney Carvalho:

I have received the petition of Lucas Larson of *MuckRock News* appealing the response of the Massachusetts Port Authority (Authority) to a request for public records. G. L. c. 66, § 10A; see also 950 C.M.R. 32.08(1). Specifically, Mr. Larson requested a copy of an identified "Disaster and Infrastructure Resiliency Plan (DRIP) for Boston Logan Airport."

Previous appeal

This request was the subject of a previous appeal. See SPR18/1644 Determination of the Supervisor of Records (November 21, 2018). In my November 21st determination I ordered the Authority to review the records, redact where necessary, and provide Mr. Larson with responsive records, provided in a manner consistent with the order, the Public Records Law and its Regulations. The Authority responded on December 7, 2018. Mr. Larson appealed and SPR18/2060 was opened as a result.

The Public Records Law

The Public Records Law strongly favors disclosure by creating a presumption that all governmental records are public records. G. L. c. 66, § 10A(d); 950 C.M.R. 32.03(4). "Public records" is broadly defined to include all documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any town of the Commonwealth, unless falling within a statutory exemption. G. L. c. 4, § 7(26).

It is the burden of the records custodian to demonstrate the application of an exemption in order to withhold a requested record. G. L. c. 66, § 10(b)(iv); 950 C.M.R. 32.06(3); see also *Dist. Attorney for the Norfolk Dist. v. Flatley*, 419 Mass. 507, 511 (1995) (custodian has the burden of establishing the applicability of an exemption). To meet the specificity requirement a custodian must not only cite an exemption, but must also state why the exemption applies to the withheld or redacted portion of the responsive record.

If there are any fees associated with a response a written, good faith estimate must be provided. G. L. c. 66, § 10(b)(viii); see also 950 C.M.R. 32.07(2). Once fees are paid, a records custodian must provide the responsive records.

Current appeal

In its December 7th response the Authority denied access to the records under Exemptions (a) and (n) of the Public Records Law. G. L. c. 4, § 7(26)(a), (n).

Exemption (a)

Exemption (a), known as the statutory exemption, permits the withholding of records that are:

specifically or by necessary implication exempted from disclosure by statute

G. L. c. 4, § 7(26)(a).

A governmental entity may use the statutory exemption as a basis for withholding requested materials where the language of the exempting statute relied upon expressly or necessarily implies that the public's right to inspect records under the Public Records Law is restricted. See Attorney Gen. v. Collector of Lynn, 377 Mass. 151, 54 (1979); Ottawa Newspapers, Inc. v. Appeals Court, 372 Mass. 539, 545-46 (1977).

This exemption creates two categories of exempt records. The first category includes records that are specifically exempt from disclosure by statute. Such statutes expressly state that such a record either "shall not be a public record," "shall be kept confidential" or "shall not be subject to the disclosure provision of the Public Records Law."

The second category under the exemption includes records deemed exempt under statute by necessary implication. Such statutes expressly limit the dissemination of particular records to a defined group of individuals or entities. A statute is not a basis for exemption if it merely lists individuals or entities to whom the records are to be provided; the statute must expressly limit access to the listed individuals or entities.

The Authority asserts that "Sensitive Security Information ('SSI') is 'information obtained or developed in the conduct of security activities the disclosure of which TSA has determined would be detrimental to the security of transportation.' 49 CFR § 1520.5(a). Federal law prohibits the Authority from disclosing this information." You also note that the "DRIP is an analysis of Authority-owned transportation critical infrastructures that are necessary to safely and securely manage and operate the Airport. The DRIP lists and assesses the actual, potential or threatened vulnerabilities to these critical infrastructures." The Authority cites to 49 CFR §§ 1520.5(a)(1), 1520.5(5), and 1520.5(12)(ii) and indicates "[t]herefore, the DRIP is considered Sensitive Security Information it is entirety and its disclosure would create a threat to public health and safety."

Exemption (n)

Exemption (n) permits the withholding of:

records, including, but not limited to, blueprints, plans, policies, procedures and schematic drawings, which relate to internal layout and structural elements, security measures, emergency preparedness, threat or vulnerability assessments, or any other records relating to the security or safety of persons or buildings, structures, facilities, utilities, transportation, cyber security or other infrastructure located within the commonwealth, the disclosure of which, in the reasonable judgment of the record custodian, subject to review by the supervisor of public records under subsection (c) of section 10 of chapter 66, is likely to jeopardize public safety or cyber security.

G. L. c. 4, § 7(26)(n).

Exemption (n) allows for the withholding of certain records which if released would jeopardize public safety. It is the duty of the custodian of records to exercise reasonable judgment to determine whether release of the record is likely to jeopardize public safety. The first prong of Exemption (n) examines “whether, and to what degree, the record sought resembles the records listed as examples in the statute;” specifically, the “inquiry is whether, and to what degree, the record is one a terrorist ‘would find useful to maximize damage.’” People for the Ethical Treatment of Animals (PETA) v. Dep’t of Agric. Res., 477 Mass. 280, 289-90 (2017).

The second prong of Exemption (n) examines “the factual and contextual support for the proposition that disclosure of the record is ‘likely to jeopardize public safety.’” *Id.* at 289-90. The PETA decision further provides that “[b]ecause the records custodian must exercise ‘reasonable judgment’ in making that determination, the primary focus on review is whether the custodian has provided sufficient factual heft for the supervisor of public records or the reviewing court to conclude that a reasonable person would agree with the custodian’s determination given the context of the particular case.” *Id.*

With respect to its Exemption (n) claim, the Authority asserts “. . . the release of the vulnerability assessment could be used by terrorists to maximize damage by targeting the specific aviation critical infrastructures in a manner consistent with the vulnerabilities reported. A terrorist could also use the information in the DRIP following a catastrophe and/or national disaster to attack the identified infrastructures and incapacitate aviation transportation.”

In camera review

In his appeal petition Mr. Larson asserts “[t]he agency has still not explained why the document (a study of Boston Logan Airport’s vulnerability to the effects of climate change--not terrorist attacks) cannot be released in a redacted format.”

It is my determination that an *in camera* inspection of the responsive records would

facilitate a determination as to the applicability of the Authority's claims under Exemptions (a) and (n), specifically the extent to which the responsive record may be withheld in its entirety. See G. L. c. 66, § 10(a) (any non-exempt, segregable portion of a public record is subject to mandatory disclosure) see also 950 C.M.R. 32.08(4). After I complete my review of the records, I will return the records to your custody and issue an opinion on the public or exempt nature of the record.

The authority to require the submission of records for an *in camera* inspection emanates from the Code of Massachusetts Regulations. 950 C.M.R. 32.08(4); see also G.L. c. 66, § 1. This office interprets the *in camera* inspection process to be analogous to that utilized by the judicial system. See Rock v. Massachusetts Comm'n Against Discrimination, 384 Mass. 198, 206 (1981) (administrative agency entitled deference in the interpretation of its own regulations). Records are not voluntarily submitted, but rather are submitted pursuant to an order by this office that an *in camera* inspection is necessary to make a proper finding.

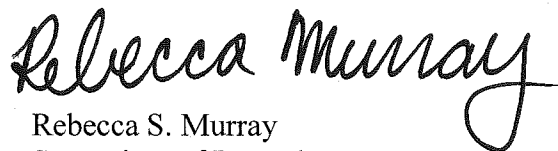
Records are submitted for the limited purpose of review. This office is not the custodian of records examined *in camera*, therefore, any request made to this office for records being reviewed *in camera* will be denied. See 950 C.M.R. 32.08(4)(c).

This office has a long history of cooperation with governmental agencies with respect to *in camera* inspection. Custodians submit copies of the relevant records to this office upon a promise of confidentiality. This office does not release records reviewed *in camera* to anyone under any circumstances. Upon a determination of the public record status, records reviewed *in camera* are promptly returned to the custodian. To operate in any other fashion would seriously impede our ability to function and would certainly affect our credibility within the legal community.

Conclusion

Accordingly, the Authority is ordered to provide this office with an unredacted copy of the responsive record without delay. The Authority may provide this office with an explanation of its position regarding the applicability of an exemption to the responsive records. Please be advised that, unlike the materials provided for *in camera* review, any such additional correspondence would be placed in the file for this appeal and would be subject to public disclosure as a public record.

Sincerely,



Rebecca S. Murray
Supervisor of Records

cc: Lucas Larson